

F I L E D	FEDERAL COURT COUR FÉDÉRALE	D É P O S É
	30-JAN-2025	
Jessica Lorch		
Ottawa, ONT	2	

Court File No. T-294-25**FEDERAL COURT****BETWEEN:****UNIVERSAL OSTRICH FARMS INC.****APPLICANT****- and -****CANADIAN FOOD INSPECTION AGENCY****RESPONDENT****NOTICE OF MOTION**

TAKE NOTICE THAT Universal Ostrich Farms Inc. will make a motion to the Federal Court on Friday, January 31, 2025, at 9:30 A.M. or as soon thereafter as the motion can be heard, at 701 West Georgia Street, Vancouver, BC.

TAKE NOTICE THAT Universal Ostrich Farms Ltd. will make a motion to the Federal Court under rule 361, or under rules 362(2) and 8, of the *Federal Courts Rules*.

THE MOTION IS FOR the following:

1. An interlocutory injunction staying the Notice to Dispose of Animals or Things issued by the Canadian Food Inspection Agency ("CFIA") on December 31, 2024 (the "Cull Order"); and
2. An order amending the Requirements to Quarantine and/or Licence to Transport Animals or Things (the "Quarantine Order") issued by the CFIA to allow testing of animals pursuant to protocols that comply with CFIA's requirements.

THE GROUNDS FOR THE MOTION ARE

1. Universal Ostrich Farms Inc. ("UOF") applies pursuant to Sections 18(1), 18.2 and 44 of the *Federal Court Act*, and Rule 361 of the Federal Court Rules to stay the Cull Order to allow the Application for Judicial Review to be heard.

### Background

2. UOF raises ostriches on a 58 acre parcel of land located about 10 kilometres outside of Edgewood, British Columbia (the "Property").
3. The principals of UOF are Karen Espersen ("Ms. Espersen") and David Bilinsky ("Mr. Bilinsky").
4. Ms. Espersen and Mr. Bilinsky have been raising ostriches since the early 1990s.
5. Mr. Bilinsky, who has training in genetics, entered the ostrich industry in 1993 with Dr. Robert Church, who was a pioneer of molecular genetics and embryo transfer technology at the University of Calgary.
6. They started a company that began importing specially selected, large ostriches from Africa. They grew the company into the largest ostrich farm in Canada and it became the leading producer of large body ostriches.
7. Ms. Espersen began working with Mr. Bilinsky in 1995 and UOF was formed in the early 2000s.
8. Together they spent the next 32 years selectively breeding the ostriches and improving the genetics to create a large, healthy bloodline of ostrich.
9. When the Covid 19 pandemic began in March 2020 it essentially shut down UOF's business.
10. Mr. Bilinsky and Ms. Espersen then became involved in scientific research that was being conducted on antibodies appearing in ostrich eggs.
11. Ostrich eggs are uniquely suited for developing antibodies because the yolks are large and a high concentration of antibodies appears in the yolks after an immune reaction occurs.
12. UOF then began working with a company that was developing protocols to produce antibodies for Covid 19. From there the scientific research led to developing many other opportunities for utilizing antibodies in the egg yolks.
13. UOF also began working closely with Dr. Tsukamoto and a group of researchers from Kyoto Prefecture University in Japan. This research was

directed towards producing and extracting IgY (immune globulin yolk) antibodies from the UOF ostrich eggs.

14. From there UOF began a venture with Struthio Bio Science Inc. and entered into an agreement to provide Struthio with ostrich eggs, which would then be used to extract antibodies.
15. Since 2020 UOF has been entirely dedicated to the production of antibodies with its ostrich herd. It is not a commercial poultry facility and it does not produce any ostrich meat or eggs for human consumption.
16. UOF had approximately 450 ostriches as of early December, 2024.
17. In mid-December, 2024 some of UOF's ostriches were showing signs of illness, and then some began to die.
18. On December 30, 2024 CFIA tested two dead ostriches with swab samples and took them for analysis.
19. On December 31, 2024 CFIA issued the Quarantine Order, and later advised UOF that the test was positive for H5N1 Avian Influenza.
20. On January 2, 2025 CFIA issued the Cull Order.
21. On January 2, 2025 a CFIA representative told UOF that, based on the information CFIA had gathered, the UOF ostriches fall into the "birds classified as having rare and valuable genetics", which provided an exemption from the Cull Order.
22. The CFIA representative told UOF to send documents regarding their cooperation with Dr. Tsukamoto, which UOF did.
23. On January 10, 2025 CFIA denied the exemption saying the exemption requires a "significant burden of proof" and "robust processes must be in place".
24. CFIA had not disclosed to UOF the test or burden of proof. Instead, UOF thought CFIA had already placed the ostriches in the "bird classified as having rare and valuable genetics category".
25. If CFIA had told UOF about the "significant burden of proof" then it would have changed UOF's approach to the exemption process.
26. Ostriches have robust immune systems, and by mid-January 2025 the herd had recovered from the illness.

27. Although 69 ostriches died, the last ostrich to die from H5N1 type symptoms was on January 15, 2025.
28. A term of the Quarantine Order prohibits UOF from testing or treating the ostriches. However, based on expert opinions obtained, it is highly likely the ostriches have reached herd immunity, and it is extremely unlikely they would be shedding the virus to each other, or people, birds, and other animals.
29. In fact, the opinion suggests it is safer to keep the ostriches with herd immunity, rather than killing them and bringing in ostriches without the immunity.
30. There are approximately 390 ostriches that are now healthy, but the Cull Order mandates that they be killed by February 1, 2025.

#### Injunction Staying Enforcement of the Cull Order

31. The test for an interlocutory injunction is well known and has three parts:
  - a. Is there a serious question to be tried?
  - b. Has the applicant demonstrated that it will suffer irreparable harm if the injunction is not granted?
  - c. Where does the balance of convenience lie as between the parties.

*JR-MacDonald Inc. V. Canada (Attorney General)*, [1994] 1 SCR 311  
("MacDonald")

32. An injunction and a stay of proceedings are remedies of the same nature and have the same test, *Toth v. Canada (Minister of Employment & Immigration)*, [1988] F.C.J. No. 587.

#### Serious Issue to be Tried

33. In order to satisfy this element of the test a judge must merely be satisfied that the issues to be tried are not vexatious or frivolous. It is a low threshold, *MacDonald at paras 54 and 55*.
34. There are a number of serious issues to be tried in the Application for Judicial Review.

#### Breach of Natural Justice

35. The first serious issue to be tried is that CFIA breached the principles of natural justice by failing to provide UOF with procedural fairness in applying for the "rare and valuable genetics" exemption to the Cull Order.

36. On January 2, 2025, the CFIA case officer advised the UOF that its ostriches fell into the “birds classified as having rare and valuable genetics” category and outlined a brief list of documents that UOF would need to provide to CFIA for the purposes of completing the “exemption from depopulation” process. UOF provided the CFIA with the requested documentation.
37. In its decision letter dated January 10, 2025, CFIA advised that UOF’s request for an exemption to depopulation of its ostriches based on them having “rare and valuable poultry genetics” was denied (the “Exemption Decision”).
38. In that letter the CFIA said the exemption requires a “significant burden of proof” and “robust processes must be in place”.
39. CFIA had not disclosed to UOF the test or burden of proof. Instead, UOF thought CFIA had already placed the ostriches in the “bird classified as having rare and valuable genetics category”.
40. If CFIA had told UOF about the “significant burden of proof” then it would have changed UOF’s approach to the exemption process.
41. The CFIA failed to observe procedural fairness in making its Exemption Decision.
42. Procedural fairness is subject to the “correctness” standard of review.
43. Administrative decision-makers, generally, must also observe procedural fairness in the implementation of statutes (*Brown v. Canada (Citizenship and Immigration)*, 2020 FCA 130 at para 138.).
44. Where a decision involves the potential for significant impact or harm on the party whose conduct is at issue, greater procedural protection is required (*Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 (CanLII), [2019] 4 SCR 653, at para 133).
45. The CFIA’s Exemption Decision and December Decision will result in significant financial harm to UOF and its employees, as well as have a significant negative impact on UOF’s ongoing research collaborations and on bio-medical research advancements that specialize in HPAI, IgY antibody, and ostrich research.
46. The simple overarching requirement in administrative decision-making is fairness (*Mavi*, 2011 SCC 30 at para 42).
47. A party’s legitimate expectation is a further aspect to procedural fairness, which is engaged where a decision-maker makes representations that a certain procedure will be followed, or a certain outcome will result. Where that occurs,

a party may seek review where that procedure was not followed, or where the expected outcome did not result.

48. The CFIA made representations in its January 2, 2025 email to UOF that a certain procedure would be followed to substantiate that UOF's ostriches fall into the "birds classified as having rare and valuable genetics" category (the "Rare and Valuable Category"), and as a result they may be exempt from "stamping-out" based on qualifying under that category. CFIA gave UOF a legitimate expectation with respect to the procedure and result.
49. The CFIA led UOF to believe that CFIA had a formal procedure in place that it would follow in making its decision with respect to whether UOF's ostriches qualified under the Rare and Valuable Category.
50. The CFIA led UOF to believe that because its ostriches qualified under the Rare and Valuable Category, they would be exempt from "stamping-out".
51. CFIA breached the rules of procedural fairness by failing to notify UOF of the requirements that it would need to meet in order to qualify under the Rare and Valuable Category, and it failed to outline the procedure that would be followed in making the decision with respect to the exemption.

#### *Lack of Transparency*

52. The second serious issue to be tried is that CFIA did not follow its own policy of being "transparent and open by design".
53. The CFIA published an Open and Transparent Agency Policy (the "Policy"). In its Policy statement, CFIA claims that one of its guiding principles is being "open by design", and its commitment to offering stakeholders and CFIA staff with clear, plain language explanations and a commitment to "transparent decision making" and "accessible and timely information".
54. Under the Policy, requirement 7.2 states that "information must be released in a timely manner that allows users to derive maximum benefit from them for decision-making purposes".
55. Despite committing to offering stakeholders with transparent decision making, the CFIA has failed to follow its own Policy by failing to publish the requirements its stakeholders would need to meet to qualify under the Rare and Valuable Category, and by failing to publish the internal decision-making process CFIA follows in making its "stamping-out" exemption decisions.

56. CFIA also failed to follow its own Policy by failing to communicate its “transparent decision making” process to UOF in making its Exemption Decision.
57. In making its Exemption Decision, CFIA was neither open by design, transparent, nor accessible. Its decision making process, and the requirements that must be met in order for a stakeholder’s animals to qualify under the Rare and Valuable Category are unclear, inaccessible, and incomprehensible.

*Lack of Reasonableness*

58. The third serious issue to be tried is that CFIA acted unreasonably by requiring the ostriches be destroyed (ie, “stamping out”), without considering the characteristics of ostriches, the value of the research potential, and the alternatives to “stamping out” provided by the World Organization of Animal Health (“WOAH”).
59. WOAH is the international standard-setting organization for the safe trade in animals and animal products under the SPS Agreement of the World Trade Organization. This agreement allows member countries, including Canada, to adopt their measures necessary to protect human, animal, and plant life and health, provided these measures are not applied in a discriminatory manner or as a disguised restriction on international trade.
60. The WOAH standards influence the CFIA’s regulations and practices, ensuring that Canadian measures align with international standards to facilitate safe trade and protect animal health.
61. The CFIA is the liaison with the WOAH. Through its legislative authority under the *Health of Animals Act*, the CFIA implements WOAH’s standards to manage the importation and health of animals in Canada.
62. In Article 10.4.1 of the WOAH Health Code, WOAH acknowledges that the use of vaccination against the high pathogenicity avian influenza virus (“HPAI”) may be recommended under specific conditions.
63. In the glossary of the WOAH Health Code, vaccination is defined as the administration of a vaccine, in accordance with the manufacturer’s instructions and the Terrestrial Manual (the WOAH Manual), when relevant, with the intention of inducing immunity in an animal or group of animals against one or more pathogenic agents.
64. In the WOAH Manual, WOAH states that vaccination against HPAI has previously been used during outbreaks in Mexico, Pakistan, and Hong Kong.

Additional countries have also implemented emergency and/or preventative vaccination programs for HPAI control, including several European Union countries, which have permitted preventative vaccination to be used against HPAI for outdoor poultry and zoo birds in the 2000s.

65. The WOAHA Manual states that experimental work for HPAI has shown that potent and properly administered vaccines increase resistance to, or prevent infection, protect against clinical signs and mortality, prevent drops in egg production, reduce virus shedding from respiratory and intestinal tracts, protect from diverse field viruses within the same haemagglutinin subtype, protect from low and high challenge exposure, and reduce excretion and thus prevent contact transmission of challenge virus.
66. The CFIA, on the Government of Canada's webpage, also acknowledges that vaccination has and can be used as an effective tool to fight against HPAI. CFIA states that vaccination has been used in various poultry species, and its effectiveness in preventing clinical signs and mortality is well documented.
67. CFIA has even formed the Highly Pathogenic Avian Influenza Vaccination Task Force in June 2023 to study the development and implementation of an HPAI vaccination program in Canada, recognizing vaccination as a viable means of fighting against HPAI.
68. Despite being presented with an optimal opportunity to utilize the vaccination alternative, and order UOF to vaccinate its ostriches against HPAI, the CFIA acted unreasonably by failing to consider vaccination as an option, and, instead, resorted to the ill-suited method of "stamping-out" the herd.
69. Under s.48(2) of the *Health of Animals Act* the Minister of Agriculture and Agri-Food (the Minister) may treat any animal or thing described in subsection (1), or require its owner or the person having the possession, care, or control of it, to treat it or to have it treated, where the Minister considers that the treatment will be effective in eliminating or preventing the spread of the disease or toxic substance.
70. The Minister has the discretion to order the UOF to treat its ostriches against HPAI rather than to impose a "stamping-out" order. The CFIA acted unreasonably by failing to exercise this discretion, and by failing to consider treatment as an alternative to "stamping-out" the ostriches.



### *Provincial Authority*

71. The fourth serious issue to be tried is whether the provincial authority should be afforded an opportunity to inspect UOF and issue an order based on its finding.
72. Provinces have significant jurisdiction over health, including property and civil rights, as well as some jurisdiction over animal genetic development and animal labs.
73. The UOF's ostriches do not serve as food and they are not bred for human consumption of any kind. Nor are they a threat to the human, avian, or wildlife population.
74. The UOF operates as a farm and genetic laboratory for the purposes of producing immunoglobulin yolk known as IgY antibodies (the "Antibodies"), meant to advance genetic development, and is, thus, primarily subject to provincial authority.
75. The UOF's property and its research is subject to the *Animal Health Act* of British Columbia.
76. Despite the UOF's operations being subject to the provincial authority, an inspector under the *Animal Health Act* has not been offered an opportunity to attend the UOF property, and to conduct an inspection of its premises and laboratories, pursuant to Part 4 and s. 24 and s.26 of the *Animal Health Act*.
77. The provincial authority should be afforded an opportunity to inspect UOF and to issue an order based on its findings.
78. This matter presents a division of powers issue, and a constitutional challenge pending the determination of the jurisdiction of the CFIA.

### *Charter Violation*

79. The final serious issue to be tried is whether CFIA has violated UOF's Charter rights by unreasonably ordering the destruction of UOF's property, including ostriches and ostrich eggs that were not affected by the illness.

### *Irreparable Harm*

80. "Irreparable" refers to the nature of the harm suffered. A harm is "irreparable" if it cannot be quantified in monetary terms, cannot be cured, or would be difficult to compensate in damages.

81. Examples of irreparable harm include being put out of business, suffering a permanent market loss or irrevocable damages to a business' reputation, or a permanent loss of natural resources, *MacDonald at para 64*.
82. An applicant need only demonstrate that it may suffer irreparable harm because there is doubt that damages would provide an adequate remedy, should it succeed at trial. Clear proof of irreparable harm is not required, *British Columbia (Attorney General) v. Wale (1986)*, 9 B.C.L.R. (2d) 333 (CA), aff'd [1991] 1 S.C.R. 62 ("Wale") at paras 47 and 50, *Winking Judge Pub Ltd. v. Donnelly Hospitality*, 2019 BCSC 336 at para 52.
83. In the case at hand, UOF will suffer irreparable harm if the ostriches are killed.
84. First, UOF will not be able to replace the ostriches. Mr. Bilinsky and Ms. Espersen have spent the last 32 years improving the genetics of this particular herd. The herd with the same level of genetics is irreplaceable.
85. Not only is the herd with the same level of genetics irreplaceable, but there is no way to replace it at all. UOF is the largest ostrich producer in Canada, there are not many others, and it would be nearly impossible to purchase 400 ostriches in Canada.
86. Losing UOF as a producer will have an impact on the ostrich industry as a whole.
87. As well, due to the importing and exporting restrictions that are now in place, it is very difficult to import ostriches from abroad.
88. Second, the financial impact of killing the ostriches will cause UOF to go out of business. Under the compensation regime of the *Health of Animals Act*, the maximum compensation for an ostrich is \$3,000. However, the cost to purchase an ostrich is \$7,500.
89. If UOF was able to purchase ostriches to replace the herd they would be yearlings. It would then take about two years before the hens start producing eggs. Until the hens start laying eggs UOF would not be able to generate income.
90. UOF also has a contractual obligation to supply ostrich eggs to Struthio, and there are several hundred thousands of dollars of potential liability for UOF if the herd is killed.
91. If the ostriches are killed, then UOF will not be able to survive the financial impact of these factors and will go out of business.

92. Third, killing the ostriches will cause irreparable harm because it will extinguish any ability to research the effect of these particular ostriches' natural immunity to H5N1.
93. Dr. Steven Pelech has opined that the UOF ostriches represent an important potential research model for, amongst other things, testing how long and effective herd immunity to H5N1 can last, *Affidavit #1 of Dr. Steven Pelech*.
94. Dr. Pelech also said that "testing egg yolks from an ostrich hen for the presence of antibodies against a virus like H5N1 would be an ideal method to evaluate natural immunity from a previous infection or immunity that may be produced using a vaccine", *Affidavit #1 of Dr. Steven Pelech*.
95. Irreparable harm will also be established if the underlying Application for Judicial Review is rendered moot, which is what would occur in this case, *De Medeiros v. Canada (Minister of Employment & Immigration)* [1994] F.C.J.No 11.
96. Finally, in the Application for Judicial Review, UOF has asserted that its *Charter* rights have been violated. An assessment of irreparable harm involving *Charter* rights should keep in mind that damages are not the primary remedy for a *Charter* violation, *MacDonald at para 65*.

*Balance of Convenience*

97. In the balance of convenience assessment, the question is which of the two parties will suffer greater harm from the granting or refusal of the injunction, pending a decision on the merits, *MacDonald at para 67*.
98. If the injunction is not granted UOF will go out of business and the unique opportunity to study natural immunity will be lost, both for the biomedical research field and CFIA's own Highly Pathogenic Avian Influenza Vaccination Task Force. Damages would be an inadequate remedy.
99. On the other hand, there is very little risk or prejudice if the injunction is granted. It has been six weeks since the ostriches first showed signs of illness, and over two weeks since the last ostrich died of H5N1 type symptoms.
100. The herd now appears healthy and, according to Dr. Pelech, it is extremely unlikely the ostriches are shedding virus. Dr. Pelech opines that it is highly unlikely that the virus would be transmissible to humans at this point. He says "the longer the ostriches remain healthy, the lower the risk of potential transmission of the virus" *Affidavit #1 of Dr. Steven Pelech*.

101. It is in the interest of justice for the injunction to be granted, so that UOF can have its Application for Judicial Review adjudicated.

Amendment of the Quarantine Order

102. UOF also seeks an order pursuant to s. 18.2 of the *Federal Court Act* amending the Quarantine Order, so that it can test the ostriches pursuant to protocols that comply with CFIA's requirements.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

Affidavit #1 of David Belinsky made January 29, 2025;  
Affidavit #1 of Karen Espersen made January 29, 2025;  
Affidavit #1 of Katrina Jones made January 30, 2025;  
Affidavit #1 of Dr. Steven Pelech made January 30, 2025

January 30, 2025



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It is expected that the motion will take approximately 2 hours for hearing.

TO: Canadian Food Inspection Agency  
c/o Department of Justice